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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 135

FRANK PALKO,

Appellant,

vs.

STATE OF CONNECTICUT.

APPEAL FROM SUPREME COURT OF ERRORS, STATE OF CONNECTICUT

BRIEF FOR THE APPELLANT

DAVID GOLDSTEIN,
GEORGE A. SADEN,
Counsel for Appellant.

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APPEAL FROM SUPREME COURT OF ERRORS, STATE OF CONNECTICUT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Errors of the State of Connecticut upon the state's appeal from the first verdict and judgment is reported in 121 Conn. 669. The opinion of the same court upon the defendant's appeal from the second verdict and judgment is reported in 122 Conn. 529. It is from the latter judgment that the appellant now appeals to this court.

JURISDICTION

The second decision of the Supreme Court of Errors of the State of Connecticut was rendered on March 4, 1937. The appeal was filed May 10, 1937, and allowed on May 10, 1937, and probable jurisdiction was noted by this court on October 11, 1937. The jurisdiction of this court rests upon the provisions of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 440, 45 Stat. 466.

QUESTIONS PRESENTED

The fundamental question involved in this case is:

(1) Was the appellant, Frank Palko, deprived of due process of law, or his privileges and immunities as a United States citizen, or both, under the two pertinent and respective clauses of Section 1 of the Fourteenth Amendment to the United States Constitution when he was subjected to a second trial for his life upon an indictment for murder in the first degree after an appeal from a verdict of guilty of murder in the second degree and a sentence of life imprisonment at the first trial upon the identical indictment, which appeal was taken, not by the accused, but by the state, pursuant to a Connecticut statute seeking to permit appeals by the state in criminal cases involving the felony of murder? See R. 7, 8, 9.

STATUTES INVOLVED

The statute presented to the test of the constitutional touchstone in this case is Title 60, Chapter 335, Section

6494 of the General Statutes of the State of Connecticut, Revision of 1930, found on page 1990 of the latter statute book, which reads as follows:

> "Sec. 6494. *Appeals by the state in criminal cases.* —Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

STATEMENT OF THE CASE

The facts are comparatively few. They are briefly summarized in *State v. Palko,* 122 Conn. 529. See R. 21, 22.

The appellant, Frank Palko, (whose name, incidentally, is properly spelled "Palka"), was indicted and charged with murder in the first degree in the wilful, deliberate, and premeditated killing of Thomas Kearney, at Bridgeport, Connecticut, on September 30, 1935. The appellant was duly tried before a court and jury upon this indictment and found guilty of murder in the second degree. The court then sentenced the appellant in accordance with the law of Connecticut to life imprisonment, with the express recommendation that he never in the future be pardoned. The state appealed from this verdict and sentence, and the Supreme Court of Errors of the State of Connecticut rendered its judgment finding error. A new trial was ordered. *State v. Palko,* 121 Conn. 670.

The appellant was subjected to a second trial upon the same indictment before a court and jury, the result of which was a verdict of guilty of murder in the first degree. The court then imposed the death penalty upon the appellant in accordance with the law of Connecticut. From this verdict and sentence the appellant appealed to the Supreme Court of Errors of the State of Connecticut, *State v. Palko*, 122 Conn. 529, and now appeals to this court from the judgment of the Connecticut Supreme Court of Errors affirming the trial court's verdict and sentence.

At the second trial, prior to the commencement of examination of the veniremen, the appellant moved that the indictment for first degree murder be dismissed upon the grounds that the second trial of this action would result in placing his life twice in jeopardy for the same offense. This motion was repeated after the jury was impaneled and sworn in and before any evidence was taken. In both instances the grounds of the motions were that the second trial placed the life of the appellant twice in jeopardy for the same offense and thus violated the due process and privileges and immunities clauses of the Fourteenth Amendment. Both motions were denied, and the appellant duly excepted. R. 10, 11.

After judgment had been rendered in the lower court, the appellant appealed to the Supreme Court of Errors of the State of Connecticut, and among the errors assigned were the denials of the above-mentioned motions. *State v. Palko*, 122 Conn. 529. See R. 11.

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of Errors of the State of Connecticut erred:

(1) In rendering final judgment affirming the judgment of the Superior Court for Fairfield County, Criminal Side, holding that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, is a constitutional act.

(2) In failing to acquit the appellant of the crime of murder in the first degree.

(3) In failing to hold that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, deprives the appellant of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) In failing to hold that Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, deprives the appellant of his life in violation of his privileges and immunities as a United States citizen, which privileges and immunities are guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) In failing to hold that upon the record and facts of this case Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, places the life of the appellant twice in jeopardy and thus deprives him of his life without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) In failing to hold that upon the record and facts of this case Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, places the life of the appellant twice in jeopardy and thus deprives him of his life in violation of his privileges and immunities as a United States citizen contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

See R. 5, 6, for the assignments of error and prayer for reversal.

SUMMARY OF ARGUMENT

I. In a murder case the defendant's life is placed in jeopardy whenever, upon a valid indictment, a jury in a court of competent jurisdiction is regularly impaneled and sworn to try the issue of defendant's guilt. *Kepner v. United States*, 195 U.S. 100. *A fortiori* where under such facts the jury actually renders a verdict of acquittal and/or guilty and sentence is passed. *Kepner v. United States, supra.*

A. The Connecticut common law followed the recognized rule on jeopardy. Under this rule the instant case presents the question of double jeopardy. *State v. Brown*, 16 Conn. 54. The instant case, based upon *State v. Lee*, 65 Conn. 265, declares a different rule at common law in Connecticut. *State v. Palko*, 122 Conn. 529.

1. Later Connecticut case, *State v. Lee*, 65 Conn. 265, and Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, upon both of which instant case is based, seek to vary the regular

Connecticut and universal rule against double jeopardy. Analysis of the reasoning in the *Lee* case reveals strained effort of the court to sustain the statute and discloses further the tacit conviction in the minds of the Connecticut court that if double jeopardy is construed as every other court in America and England has universally construed it, the Connecticut statute is unconstitutional as violating a fundamental right under the Fourteenth Amendment.

B. Where the issues involve under the Fourteenth Amendment the application of a state statute to admitted facts, this court must analyze the facts and draw its own inferences as to their ultimate legal effect. *Truax v. Corrigan*, 257 U.S. 312, 324, 325.

1. The proper legal conclusion for this court to reach upon the facts of this case is that the appellant's life was subjected to double jeopardy by operation of Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, in contravention of the appellant's rights under the due process and privileges and immunities clauses of the Fourteenth Amendment. *Kepner v. United States*, 195 U.S. 100; *Ex parte Lange*, 18 Wall. 163; *Ex parte Ulrich*, 42 F. 587; *In re Bennett*, 84 F. 324.

II. The right against double jeopardy is protected under the privileges and immunities clause of the Fourteenth Amendment.

A. A proper interpretation of this clause in the light of accurate historical data, recent cases, and a pervading national policy among the states at large compel such a conclusion. Flack, *Adoption of the Four-*

teenth Amendment; Colgate v. Harvey, 296 U.S. 404; Story on the Constitution, (5th ed.) pp. 688-689, Section 1938; cf. *Powell v. Alabama*, 287 U.S. 45; see, also, dissenting opinions of Mr. Justice Harlan in *Hurtado v. California*, 110 U.S. 516, *Maxwell v. Dow*, 176 U.S. 581, and *Twining v. New Jersey*, 211 U.S. 78; and see further, dissents by four justices in *Slaughter-House Cases*, 16 Wall. 36; and Section III. B. *infra*.

III. The right against double jeopardy is protected under the due process clause of the Fourteenth Amendment.

A. A proper interpretation of this clause in the light of accurate historical data, recent cases, and a pervading national policy among the states at large compel such a conclusion. Flack, *Op. Cit.*; *Brown v. Board of Levee Com'rs.*, 50 Miss. 468; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272; *Powell v. Alabama*, 287 U.S. 45.

B. The right against double jeopardy is a fundamental and immutable principle of law necessary to the protection of the life and liberty of every citizen and not to be abridged by any state.

1. The English law is in accord. 4 Blackstone's *Commentaries* (Lewis ed.) 335; Broom's *Legal Maxims* (8th ed. by Pease and Chitty), p. 273; 9 Halsbury, *Laws of England* (2d ed.) Hailsham Ed., pp. 152, 153, section 212; *Rex v. Sheridan*, 30 Cox C.C. 447; *Rex v. Reynell*, 6 East 314; *Rex v. Silverton*, 1 Wils. K.B. 297.

2. The crushing weight of authority in the United States concurs that the right against double

jeopardy is a fundamental and immutable principle of law. *Kepner v. United States, supra; Ex parte Ulrich, supra; In re Bennett, supra; Ex parte Lange, supra; Cochran v. State,* 119 Md. 539; *Holt v. State,* 160 Tenn. 366; *State v. Cooper,* 13 N.J.L. 361, 370; *Williams v. Commonwealth,* 78 Ky. 93; *Ex parte Bornee,* 76 W. Va. 360; *State v. Jones,* 7 Ga. 422; *State v. Powell,* 86 N.C. 640; *Commonwealth v. Cummings,* 3 Cush. 212; 1 Bishop on Criminal Law, (9th ed.), pp. 734, 772, sections 992, 1045, respectively. Almost all of the states in the country have either a constitutional or statutory provision against double jeopardy.

The right against double jeopardy is at least as sacred as the right to the aid of counsel. Cf. *Powell v. Alabama,* 287 U.S. 45. No state should have the power or right to subject a prisoner's life to double jeopardy. Some rights in every free government are beyond the control of the state. *Loan Association v. Topeka,* 20 Wall. 655. Stealthy encroachments against the constitutional rights of the citizen must be guarded against by this court. *Boyd v. United States,* 116 U.S. 616, 635. This is especially so in capital cases where a court must be extremely careful how it interferes with any chances of life in favor of the prisoner. *United States v. Perez,* 9 Wheat. 579.

The right against double jeopardy is a salutary precaution against the abuse of sovereign power. *State v. Jones,* 7 Ga. 422. No narrow or illiberal construction should be given to words securing the fundamental personal rights of every citizen. *Ex parte Lange,* 18 Wall. 163, 178.

CONCLUSION

The right against double jeopardy, based either upon a plea of former conviction or acquittal as it might be in the instant case, is a fundamental and immutable right, national in its scope, and belonging to every citizen of this country. No state can abridge that right. Therefore, Section 6494 of Title 60, Chapter 335, of the General Statutes of the State of Connecticut, Revision of 1930, as applied to the facts of this case, violates both the privileges and immunities clause and the due process of law clause of Section 1 of the Fourteenth Amendment, and the judgment in *State v. Palko*, 122 Conn. 529, should be reversed and vacated.

ARGUMENT

I. *In a murder case defendant's life is placed in jeopardy whenever upon a valid indictment, a jury in a court of competent jurisdiction is regularly impaneled and sworn to try the issue of defendant's guilt; a fortiori, where under such facts the jury actually renders a verdict of acquittal and/or guilty and sentence is passed.*

The word "jeopardy" comes to us from the common law, and in ascertaining its meaning we must perforce construe it with reference to its source. *Kepner v. United States*, 195 U.S. 100, 126. The settled meaning of the word "jeopardy" cannot be doubted. In America it has meant and continues to mean that a prisoner is once in jeopardy whenever, upon a valid indictment, a jury in a court of competent jurisdiction is regularly impaneled and sworn to try the issue of his guilt. *Ex parte Steve Bornee*, 76 W. Va. 360, L.R.A. 1915 F,

1093; *Ex parte Glenn*, 111 F. 257; 1 Bishop on Criminal Law (9th ed.), 752; 1 Wharton's *Criminal Law*, 541-546, Sec. 395; *Id.*, 556, Sec. 396; 8 R.C.L. 138, Sec. 120. Jeopardy means exposure to danger. Where a person is placed on trial on a criminal charge before a jury sworn to decide the issue between the state and himself, he is then exposed to danger because he is in peril of his life or liberty. *Kepner v. United States*, 195 U.S. 100; 8 R.C.L. 139, Sec. 120; 16 C.J. 237, Sec. 364; *State v. B———*, 173 Wis. 608, 613; *State v. Robinson*, 46 La. Ann. 769; *Wilson v. Commonwealth*, 212 Ky. 584; *State v. Slorah*, 118 Me. 203; *Green v. State*, 147 Tenn. 299; *Martin v. State*, 163 Ark. 103; *State v. Thompson*, 58 Utah 291; *State v. Duvall*, 135 La. 710; *State v. Gilmer*, 202 Wis. 526; *Rosser v. Commonwealth*, 159 Va. 1028; *State v. Brooks*, 38 Okla. Crim. Reports 302; *In re Brown*, 139 Kan. 614; 2 Freeman on Judgments (5th ed.), p. 1369, section 650. Further citations to a like effect might be added without end, but they are unnecessary at this point.

It naturally follows, *a fortiori*, that when a trial proceeds beyond the point of impaneling and swearing in the jury to a verdict and acquittal on a charge of murder in the first degree and a verdict of guilty on a charge of murder in the second degree, and the court renders its sentence upon the latter verdict, the defendant's life has beyond the faintest glimmer of doubt been placed in jeopardy so that a second trial upon the same indictment would be subjecting him to a double peril. The fact that the second trial follows on appeal by the state of the verdict at the first trial, and that the second trial is based upon one and the same indict-

ment as the first trial does not alter the situation as far as double jeopardy is concerned. The defendant is still entitled at the second trial to interpose a plea of double jeopardy, and such a plea should be sustained by the court. *Kepner v. United States*, 195 U.S. 100, 126; *In re Bennett*, 84 F. 324; *Commonwealth v. Deitrick*, 221 Pa. 7; *State v. Van Horton*, 26 Ia. 402; *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *Pierson v. State*, 159 Ala. 6; *Ex parte Bornee*, 76 W. Va. 360; *Wilson v. Commonwealth*, 212 Ky. 584; *People v. Swift*, 59 Mich. 529; *State v. Spear*, 6 Mo. 644; *State v. Lee*, 10 R.I. 494; *State v. Burris*, 3 Tex. 118; *State v. Newkirk*, 80 Ind. 131; *State v. Shields*, 49 Md. 301; *State v. Hall*, 3 Nev. 172; *State v. Herrick*, 3 Nev. 259; *State v. Credle*, 63 N.C. 506; *State v. Hubbell*, 18 Wash. 482; *State v. Anderson*, 3 Sm. and M. (Miss.) 751; *People v. Webb*, 38 Cal. 467; *Commonwealth v. Ball*, 126 Ky. 542; *State v. Hand*, 6 Ark. 169; *State v. Powell*, 86 N.C. 640. See, also, dissenting opinions in *Trono v. United States*, 199 U.S. 521, which opinions concur with the view taken in *Commonwealth v. Deitrick*, 221 Pa. 7, that even where the defendant, indicted for a higher offense, is convicted under the indictment of a lower offense, and himself appeals the conviction, upon a reversal of the conviction and a new trial, the defendant cannot be tried again for the higher offense since the previous conviction acts as an acquittal of that charge.

In view of these citations there cannot be any question in the instant case that the appellant had been placed in jeopardy of his life as soon as the jury had been impaneled and sworn at the first trial, or if not then, certainly after the rendition of a verdict of guilty of murder in the second degree, (which necessarily im-

plied an acquittal of murder in the first degree), and a sentence on the verdict of life imprisonment without hope at any time of pardon. The cases and textbooks already cited and others which will be cited throughout this brief confirm the fact that not only is the weight of authority overwhelming on the question when jeopardy attaches, but it is actually crushing. Yet in the face of all this the Connecticut court stands literally defiant. *Kepner v. United States*, 195 U.S. 100, 132.

A. *Connecticut common law followed recognized rule on jeopardy. Under this rule instant case presents question of double jeopardy.*

To understand the true significance of the instant case it is well to consider the Connecticut common law on the question of double jeopardy. While the Connecticut constitution has never contained a provision expressly protecting a defendant against being placed twice in jeopardy, nevertheless the Connecticut courts have always jealously guarded that right until the advent of Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930. In *State v. Benham*, 7 Conn. 414, 418, the court refers to the maxim against double jeopardy as a

> "universal maxim, . . . thought worthy to be incorporated to a certain extent, into the constitution of the *United States*. And that an acquittal or conviction, by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever, a bar, is equally clear."

In *State v. Brown*, 16 Conn. 54, 58, after an acquittal of the defendant in the Superior Court, the prosecutor sought a new trial claiming errors in rulings on evidence made by the trial court. The Supreme Court of Errors said:

> "This defendant was tried in the superior court, and upon a fair hearing, has been acquitted, by the jury there; and yet, the public prosecutor on behalf of the state demands a new trial!
>
> "This is a bold experiment and has never to our knowledge been made before in this state . . .
>
> ". . . This is a case of acquittal; and it is conceded everywhere, where the principles of the common law of England are recognized and prevail, that in all cases of indictments or informations for matter criminal, in which the accused has been acquitted, . . . he shall not again be put in jeopardy by a new trial granted upon the motion of the state . . ."

In *Wilson v. State*, 24 Conn. 56, 62, reference is made to the principle of double jeopardy:

> "The right of pleading a former conviction, or former acquittal, of the same crime, (for in both cases the same rules govern,) rests upon the important common law maxim of criminal jurisprudence, that no person shall be put in jeopardy, that is to say, tried, more than once for the same offense. This principle we do not mean to impair."

Again, in *State v. Reed*, 26 Conn. 201, 207, the court speaks of the ". . . well-established and familiar prin-

ciple that no person shall be twice put in jeopardy for the same offense, . . ."

The Connecticut constitution was not adopted until 1818. Up to that time the original charter granted to the colony in 1662 by King Charles II remained in effect by virtue of a statute passed in 1776 by the legislature declaring the charter to be its civil constitution under sole authority of the people, independent of any king or prince. J. B. Thayer, *Legal Essays*, page 4. Under that charter, the colonists of Connecticut were to have all of the rights at law etc. "as our other liege People of this our Realme of England." Bates, *The Charter of Connecticut*, pp. 18-19. Swift, in his Digest, confirms the statement that the rights of personal liberty regularly recognized under the "due process" clause of the Magna Charta but not expressly mentioned in the Connecticut constitution are nevertheless just as sacred and as fully enjoyed in Connecticut. Swift's Digest, 17.

Upon this basis, then, it seems proper to conclude that the rule in Connecticut relative to the right against double jeopardy at common law joined hands with that of England, the United States, and the other states. Later Connecticut decisions, however, have reached a different conclusion. *State v. Muolo*, 118 Conn. 373; *State v. Lee*, 65 Conn. 265. We shall presently have more to say about these cases.

1. *Later Connecticut case, State v. Lee, 65 Conn. 265, and Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, upon both of which instant case is based, seek to vary regular Connecticut and universal rule against double jeop-*

ardy. Analysis of reasoning in Lee case reveals tacit conviction in minds of Connecticut court that if double jeopardy is construed as universally construed elsewhere, the Connecticut statute is unconstitutional as violating fundamental right under Fourteenth Amendment.

In 1886 the statute now known as Section 6494, General Statutes of the State of Connecticut, Revision of 1930, was enacted, and in *State v. Lee,* (1894) 65 Conn. 265, received its first application. The decision of the Connecticut court is peculiar in several important respects. At common law there could be no question in Connecticut as to the meaning of jeopardy. There could be no doubt but what an appeal by the state after an acquittal would be a patent violation of the age-old and uniformly accepted rule of double jeopardy. With the passage of the statute, however, the Connecticut court found itself upon the horns of a dilemma. The *Lee* case presented the problem of constitutionality. On the other hand the court had ruled at least once previously in an identical situation upon the point of double jeopardy. *State v. Brown,* 16 Conn. 54. We surmise that the court in the *Lee* case was very much alive to the serious constitutional question under the Fourteenth Amendment and concluded, therefore, that the lesser of the two evils was to work some magic with the rule against double jeopardy by construing it in a way never before and never since understood by any other court in this country or England. After the *Lee* case, double jeopardy no longer existed in criminal cases where the state desired to appeal. Nothing today, in other words, precludes two, three, four, or more prosecutions by the state if it desires to harass a defend-

ant. The fact that a man is fighting for his life is of no moment.

It is extremely significant to observe that the *Lee* case is placed squarely upon the proposition that an appeal by the state in a criminal case does not subject the defendant to double jeopardy because all of the proceedings are part of one trial, and therefore there exists but one jeopardy which is not exhausted until the judgment becomes "final." This construction of the rule against double jeopardy is unquestionably the product of brilliant ingenuity, but unfortunately behind its face lurks the clear implication that the Connecticut court could not possibly uphold Section 6494 of the General Statutes as constitutional if it admitted at the outset that an appeal by the state after an acquittal *did* subject the defendant to double jeopardy. In the latter instance it was manifest in the minds of the Connecticut court that to describe the situation there presented as one involving double jeopardy would necessarily prevent their sustaining the statute under the Fourteenth Amendment. The court therefore chose to hew away a large portion of that fundamental maxim of criminal jurisprudence, and thus avoid a consideration of due process of law under the federal constitution. Counsel for the accused raised the issue of due process of law under the Fourteenth Amendment (*State v. Lee*, 65 Conn. 265, 269), but the court very carefully eschewed its consideration. The phrase "due process" isn't even mentioned in its decision. We submit this tacit admission of weakness, when considered with the decisions of this court on double jeopardy, is a confession that the instant appeal to this court in this case is one which should be sustained. The second judgment (*State v.*

Palko, 122 Conn. 529) from which this appeal is taken is expressly founded upon the same proposition as *State v. Lee, supra.* The language of the court, at pp. 541-542 is as follows:

> "... Our statute, which permits the State to appeal with the permission of the trial court, was first adopted in 1886 and has been in force for more than fifty years. As construed in *State v. Lee*, supra, 282, and *State v. Carabetta*, 106 Conn. 114, 116, ... we conclude that it does not subject the accused to double jeopardy or abridge his privileges and immunities as a citizen of the United States, or deprive him of his life or liberty without 'due process of law.' "

From this statement of the court it is manifest that the court has again sought in the instant case by a process of construction to convert a fundamental maxim of criminal jurisprudence into a matter of mere procedure which can be changed and bandied around at the will of the state legislature. Moreover, because the Connecticut court flatly declares its decision (*State v. Palko*, 122 Conn. 529, 538-542) is based upon the fact there was no double jeopardy as that doctrine is construed in Connecticut, the citation of federal cases therein completely lose significance, and whatever is said of the privileges and immunities and due process clauses of the Fourteenth Amendment is deprived of any weight because the real issue has been astutely evaded. If we concede the palm to the Connecticut court on the question of double jeopardy, we have equalized the status of both criminal and civil trials. What is there, then, to prevent the state from abolishing the rule of proof beyond a reasonable doubt in criminal

cases and thus complete that equality? And what is to prevent the state from needlessly harassing a defendant in criminal trials?

With the greatest deference to the wisdom and learning of the Connecticut court, let us consider one other aspect of the *Lee* and instant cases which confirms the appellant's contention that the Connecticut court consistently avoids a proper interpretation of double jeopardy because it recognizes in such an interpretation the unconstitutionality of Section 6494 of the General Statutes of the State of Connecticut, Revision of 1930, under the Connecticut constitution and the Fourteenth Amendment. The Connecticut court has decided that no double jeopardy is involved under that statute because there is only one single continuing jeopardy when the state appeals seeking a new trial after an acquittal or conviction. All this is rather astounding when one considers that if the common law rule in Connecticut as set forth in these cases is what the court describes it to be, where, then, lies the necessity for such a statute as Section 6494? If, in other words, when the state appeals after an acquittal or conviction, it is not subjecting the defendant to any double jeopardy, this must always have been so at Connecticut common law; and the very reason which Hamersley, J., urges in support of the statute is in itself the perfect reason why the statute should never have come into existence. To express it differently, the panegyrics spread across the printed page in praise of the statute come in substance at the end to be heaped upon a non-entity; and the very words of the court that seek to give life to a new law instead spell its death.

In the light of these circumstances the thought next occurs: if the statute in reality is but a hollow shell, hasn't the Connecticut court maneuvered itself from a logical point of view into a decidedly untenable position? On the one hand it maintains that the statute is constitutionally sound under the state and federal constitutions even though it changes the rule at common law in Connecticut; and at the same time the court sustains this contention by an ingenious demonstration of logic disclosing that the statute never *did* change the Connecticut common law! Cf. *State v. Brown*, 16 Conn. 54. We respectfully submit that there are few examples of legal jiu jitsu in the reported cases of any state that can excel *State v. Lee, supra.* From what source do such contortions in logic spring? Obviously from the irresistible conviction in the minds of the court that the defendant in the *Lee* case was actually being subjected to double jeopardy under every known interpretation of that fundamental and immutable principle of the law in direct contravention of the earlier Connecticut cases, the "due course of law" clause of the Connecticut constitution, and the "due process of law" clause of the Fourteenth Amendment. Here in itself is sufficient reason for sustaining the appellant's appeal.

We believe that the instant case stands or falls upon the legal interpretation given to Section 6494, General Statutes of Connecticut, Revision of 1930, as related to the facts of this case and to the fundamental rule against double jeopardy. The Connecticut cases, as we have already pointed out, contend there is no double jeopardy, and that, according to the Connecticut courts, puts an end on it at common law, under the statutes, and under the Connecticut constitution.

A complete analysis of the reasoning of the Connecticut court upon the doctrine of double jeopardy requires advertence to the case of *State v. Muolo*, (1934) 118 Conn. 373, in which at common law a writ of error was allowed the state upon a ruling of a City Court sustaining defendant's demurrer to an information. It would appear from that decision a defendant in Connecticut could conceivably be left entirely in suspense by the state, after a ruling in the defendant's favor, for a period of three years. In Connecticut a writ of error, until 1935, could have been brought any time within three years after the rendition of judgment. Section 6013, General Statutes of the State of Connecticut, Revision of 1930. This was changed in 1935, (Sections 1664 c and 1679 c, Cum. Supp., 1935), when writs of error were required to be brought within two weeks after rendition of judgment. Apparently this change occurred to offset a rather awkward situation created by the *Muolo* case, which was based upon Sections 5705 and 6013, General Statutes of the State of Connecticut, Revision of 1930. This case further leaves in doubt the question whether a writ of error can be brought by the state in criminal cases within the jurisdiction of the Court of Common Pleas or the Superior Court. It would seem that writs of error by the state if at all permissible at common law in Connecticut, would be permissible in all criminal cases whatever the court in which the case might originate. This would seem to be the clear implication of the court's reasoning in the *Muolo* case, although this logic contraverts Section 6492, General Statutes of the State of Connecticut, Revision of 1930, providing for writs of error by the defendant only. Cf. *State v. Brown*, 16 Conn. 54, 59. All of these facts are interest-

ing as a sidelight upon the attitude of the Connecticut court with regard to the protection of an individual accused of crime.

B. *Where issues involve under Fourteenth Amendment the application of a state statute to admitted facts, this court must analyze the facts and draw its own inferences as to their ultimate legal effect.*

But the rulings of the Connecticut court upon the issues here involved do not preclude an original consideration of the case at hand by this court under the due process and privileges and immunities clauses of the Fourteenth Amendment. This court has the duty of ascertaining whether or not Section 6494, referred to above, when applied to the facts of this case, viz. an appeal taken by the state after an acquittal of first degree murder and a conviction of second degree murder, followed by a new trial at which the defendant was convicted of first degree murder upon the identical facts and the same indictment, violates either or both of those two classes of the Fourteenth Amendment. *Truax v. Corrigan*, 257 U.S. 312, 324, 325. There is no dispute as to the facts relating to the appeal and new trial; the major dispute relates to the legal effect which is to be granted them. See *Mackay v. Dillon*, 4 How. 421, and *Dower v. Richards*, 151 U.S. 658, 667, both cases dealing with the duty of this court to determine for itself the legal effect of evidence as bearing upon the question of federal law, regardless of the fact the state courts in each instance had already expressed an opinion in that respect. See, also, *Great Northern Ry. v. Washington*, 300 U.S. 154, 165-167; *Norris v. Alabama*, 294 U.S. 587; *Chicago, Milwaukee & St. Paul*

Ry. Co. v. Minnesota, 134 U.S. 418, 456, 457; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U.S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 277 U.S. 601, 611; *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U.S. 573, 591; *Norf. & West. Ry. v. West Virginia*, 236 U.S. 605, 609, 610; *Snyder v. Massachusetts*, 291 U.S. 97; *Brown v. Mississippi*, 297 U.S. 278; *Nor. Pac. Ry. v. North Dakota*, 236 U.S. 585, 593; *Jones National Bank v. Yates*, 240 U.S. 541, 552, 553. Thus, where the issues involve under the Fourteenth Amendment the application of a state statute to admitted facts, this court must analyze the facts and draw its own inferences as to their ultimate legal effect. In this respect this court is not bound by the conclusion of the state court. *Truax v. Corrigan*, 257 U.S. 312, 324, 325. Where a federal right is concerned, this court is not bound by the characterization given to a state statute by state courts, or relieved of the duty by it of considering the real nature of the statute and its operation and affect upon the asserted federal right. See *Carpenter v. Shaw*, 280 U.S. 363; *Corn Products Refg. Co. v. Eddy*, 249 U.S. 427, 432; *Bailey v. Alabama*, 219 U.S. 219, 237, 238; *Near v. Minnesota*, 283 U.S. 697, 708, 709; *Mugler v. Kansas*, 123 U.S. 623, 661; *Herndon v. Lowry*, 301 U.S. 242, 260.

1. *Proper legal conclusion for this court to reach on facts of this case is that appellant's life was subjected to double jeopardy by operation of Section 6494 of General Statutes of Connecticut, Revision of 1930, in contravention of appellant's rights under due process and privileges and immunities clauses of Fourteenth Amendment.*

This court has had occasion to pass upon the identical question of double jeopardy as presented here in *Kepner v. United States*, 195 U.S. 100. There, however, the Fifth Amendment and not the Fourteenth was involved. But on the point relating to what constitutes double jeopardy the case is controlling. The defendant in the case had been acquitted of embezzlement in a trial before the court without a jury. The United States appealed to the Supreme Court of the Philippine Islands, the judgment was reversed and the case remanded for a new trial, at which the defendant was found guilty and sentenced to imprisonment. The defendant claimed a violation of the double jeopardy provision under the Fifth Amendment. It was the contention of the United States in arguing before this court that "double jeopardy" ought to be construed under the Spanish law prevailing before cession of the islands to the United States. Under that law a person was not regarded in jeopardy in the legal sense until there had been a judgment in the court of last resort. But this court held that "double jeopardy" must be construed according to its settled meaning under the law of the United States government, and not under the Spanish law. In ascertaining this meaning of the phrase taken from the Bill of Rights, the common law is the principal source of guidance. *Id.*, p. 126. At common law protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense. *Id.*, p. 126.

In commenting upon the unanimity of the state courts in following the foregoing interpretation of "double jeopardy," this court, in passing, seriously,

albeit euphemistically, questioned the wisdom and correctness of *State v. Lee, supra.* At p. 132 this court said:

> "The case of *State v. Lee*, 65 Conn. 265, in the reasoning of the court seems opposed to this view . . .
>
> "The exceptional character of the decision . . . is stated by the learned editor of American State Reports in a note to the case as reported in 48 Am. St. Rep. 202, in the following language:
>
> 'This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy.'"

In *Ex parte Lange,* 18 Wall. 163, the prisoner was convicted under a federal statute. A few weeks after conviction and after he had started serving sentence, he was brought before the same trial court on a writ of *habeas corpus*, the former judgment was vacated, and a new sentence imposed. This court ordered the prisoner discharged.

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense . . .

> "... The common law not only prohibited a second punishment for the same offense, but it went further and forbade a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

In the instant case the appellant was sentenced at the first trial and had commenced service of that sentence when he was brought back into the same court, re-tried for the same offense, and sentenced a second time, in this instance, to death.

In addition to these cases we have the rulings of two lower federal courts sustaining the appellant's contention. The first is *Ex parte Ulrich*, 42 F. 587, which expresses in no uncertain terms its deep-seated conviction on the principle of double jeopardy and any attempt by state statute to abolish it. There the defendant had been indicted in a state criminal court for bigamy. The case was called for trial, a jury duly impaneled and sworn, and testimony taken. After the trial had proceeded a few days the judge announced he wasn't feeling well enough to proceed. He therefore ordered the jury discharged and the case continued for further trial at a later date before another jury. In the interim the defendant was remanded to jail. At the second trial the defendant pleaded double jeopardy, was overruled, tried, and found guilty. He sought a writ of *habeas corpus* in the federal court, which was granted, and the defendant ordered discharged. Although this case was subsequently reversed in *Ex parte Ulrich*, 43 F. 661, upon the grounds that the federal court had no jurisdiction to issue a writ of *habeas*

corpus because the defendant's proper remedy was by appeal to the Supreme Court of Missouri, nevertheless the opinion of the court is apt and illuminating on the present problem.

The court in the *Ulrich* case points out the true effect of the ruling in *Hurtado v. California*, 110 U.S. 516, by limiting its application solely to the authorization of informations instead of indictments in the state courts. We shall have more to say later of the *Hurtado* case. The court continues at p. 593 to concur heartily with Mr. Justice Harlan's dissent in the *Hurtado* case insofar as that justice poignantly observes the *reductio ad absurdum* of the majority opinion relative to double jeopardy. The true import of the due process clause of the Fourteenth Amendment is discussed, and the rule against double jeopardy is definitely held to exist as a fundamental right shielded by the protecting arm of that clause.

The second case in support of appellant's contentions is *In re Bennett*, 84 F. 324. The defendant had been charged at a former trial with the crime of assault with intent to commit murder. At that trial he had been found guilty of an assault with a deadly weapon, a lesser crime than that charged. The defendant had moved for a new trial, and the motion had been granted. On the second trial the defendant was tried upon the same information, viz. assault with intent to commit murder. He was found guilty as charged. He then sought a writ of *habeas corpus* in the federal district court, which was denied because although the second conviction was illegal in that the defendant could not be retried for the greater offense, there were other

charges in the information on which the defendant had not been tried. The court said:

> "The right of a person, after acquittal by a jury, to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted, is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to citizenship; and, unquestionably, the guaranty of due process of law, found in the Fourteenth Amendment to the constitution of the United States, was intended, among other things, to secure to the citizen this right, and deprives the state of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, . . .
>
> "The judgment of the court . . . is in violation of the constitutional rights of the petitioner . . . and . . . is void in the extreme sense. After the petitioner was acquitted of the higher offense charged in the information, the . . . court . . . had no jurisdiction to again place him on trial for such offense . . . and, if there is any statute of the state which attempts to confer upon the courts of the state such a jurisdiction, it is, insofar as it attempts to do so, clearly repugnant to the provision of the Fourteenth Amendment to the constitution of the United States . . ."

From these cases it is patent that double jeopardy, properly construed in the light of its use throughout the centuries of English and American legal history, prohibits appeals or new trials by the state for the same offense after an acquittal or conviction of the defend-

ant. Additional authority for this statement may be found in numerous cases cited throughout this brief. We shall not attempt at this point in the argument to gather them all together. Nevertheless, we respectfully submit upon the foregoing authority and argument that the appellant's life has been subjected to double jeopardy in contravention of his rights under the Fourteenth Amendment.

II. *Right against double jeopardy is protected under privileges and immunities clause of Fourteenth Amendment.*

A. *Proper interpretation of this clause in light of accurate historical data, recent cases, and pervading national policy among states at large compel such a conclusion.*

Lest there be any misunderstanding of the appellant's contentions in this brief, we wish to make clear once and for all that we believe the right against double jeopardy is such a fundamental and immutable principle of law, national in scope, that it naturally falls within the protection of both the privileges and immunities and due process of law clauses of the Fourteenth Amendment. In other words, we do not contend that to sustain the appellant's case it is necessary to overrule the *Slaughter-House Cases*, 16 Wall. 36, *Hurtado v. California*, 110 U.S. 516, *In re Kemmler*, 136 U.S. 436, *Maxwell v. Dow*, 176 U.S. 581, *Twining v. New Jersey*, 211 U.S. 78, and other cases dependent thereon. We frankly and respectfully admit our disagreement with much of what is said in those cases, but their holdings do not by any means control the instant case. For reasons presently to be discussed, we

prefer on the whole the logic of the dissenting opinions in those cases.

There can be no doubt that the privileges and immunities clause of the Fourteenth Amendment protects only such rights as belong to a citizen of the United States as that status is distinguished from the status of state citizenship. *Colgate v. Harvey*, 296 U.S. 404, 428. It is, however, difficult to deny from the point of view of logic and common sense that many rights can exist simultaneously in both categories, belonging to the same man at the same time, both in his capacity as a citizen of the United States and as a citizen of the state where he is resident. These rights, the enumeration of which this court and all other courts have very carefully avoided for good reason, follow the citizen of one state into every other state of the Union. They are, it seems to us, largely to be found among the first ten amendments to the federal constitution. On the other hand they are not necessarily restricted to the rights specifically enumerated in those amendments. Speaking of the right to aid of counsel under the due process clause of the Fourteenth Amendment, this court properly considered in *Powell v. Alabama*, 287 U.S. 45, 68, the nature of the right itself and the rulings of this and other courts upon the question. Thus a proper test of a privilege and immunity should include a careful consideration of the attitude of the states at large upon the given principle of law. By gathering the consensus of opinion among all the states upon such a principle of law we can assure ourselves at least as far as that principle of law is concerned that the country has adopted after mature deliberation a policy which can accurately be described as national

in its scope and which should be recognized and enforced as such by this court in order to prevent straying from the fold by one or two states. At this point we shall forego lengthy citations supporting the proposition that the crushing weight of authority in practically every state of this country and in England reveals a universal policy to erect barriers against placing a man's life in double jeopardy. *Ex parte Steve Bornee*, 76 W. Va. 360. Numerous other citations have either already been mentioned or will be adverted to below in discussing the due process clause of the Fourteenth Amendment.

An extremely significant factor in the determination of what constitutes a national right is found in its specification among the first ten amendments. The right against double jeopardy is expressly provided for in the Fifth Amendment. In broaching this angle of discussion we are not unaware, of the statement in *Twining v. New Jersey*, 211 U.S. 78, 98, to the effect that the argument seeking to incorporate the first eight amendments into the Fourteenth Amendment thus making those amendments applicable to the states is no longer open to question. But we respectfully desire to submit for the usual and thorough deliberation of this court a scholarly document which, to counsel's knowledge, has not hitherto been called to the court's attention. It is Flack's *Adoption of the Fourteenth Amendment*. In its preface, pp. 7-9, there is a discussion of what the author considers the erroneous views of this court in the *Slaughter-House Cases*, 16 Wall. 36, and *Maxwell v. Dow*, 176 U.S. 581. Mr. Flack then proceeds in the body of his book to demonstrate through meticulous adherence to facts the irresistible conclusion

that the minority opinion in the *Slaughter-House Cases, supra,* is correct.

Numerous references are made to the Congressional Globe of the day, the representative newspapers and statesmen of the country at large, the available records of the various state legislatures, and other reliable sources of public opinion. We are also aware of the pronouncement by this court in *Maxwell v. Dow,* 176 U.S. 581, 601, where it is said that one or two speeches in Congress relative to the import of the Fourteenth Amendment are of no consequence, especially in the case of a constitutional amendment which requires ratification by the states. But this court there proceeds to point out the safe way of construction. The language of the amendment is to be read in connection with the known condition of affairs out of which the occasion for its adoption occurred, and then to construe it, if there be any ambiguity, to forward the known object of the amendment. See, also, the dissenting opinion of Mr. Justice Sutherland on the question of constitutional construction, *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 453. It would seem that Mr. Flack has thoroughly complied with this rule of construction throughout his book. Obviously, the complete debates in Congress are one of the important factors revealing the condition of affairs at the time and the known object of the amendment. But Mr. Flack does not stop there; he compiles exhaustive data culled from every conceivable source in the country, and his conclusions seem irrefutable.

The first section of the Fourteenth Amendment, which contains both clauses pertinent to the issues of this case, was drafted by Senator Bingham. His speech

is set forth in elaborate detail by Flack, *Adoption of the Fourteenth Amendment*, pp. 231-236. As Mr. Bingham so carefully pointed out, its main and deliberate purpose was to make the first eight amendments of the federal constitution applicable to the states. Mr. Bingham's position in opposition to the Civil Rights Bill was significant because he was convinced that the Bill was unconstitutional unless an amendment, such as Section 1 of the Fourteenth Amendment, was passed and ratified. Flack, *Op. Cit.*, pp. 31-33, 231-234. Senator Howard of Michigan, who was present at all of the joint committee meetings on the Fourteenth Amendment, and who was duly qualified to speak its views before the Senate, stated that it was the intention of the Amendment to incorporate the personal rights specified in the first eight amendments into the Fourteenth Amendment. The great object of the Fourteenth Amendment was to restrain the power of the states and compel them to guarantee the fundamental rights specified in the first eight amendments. Flack, *Op. Cit.*, p. 84. Senator Howard's statement of the purpose of the Fourteenth Amendment was clear and concise. His interpretation was not questioned by anyone on the committee nor by any minority opposed to the Amendment. In fact, the minority opposed the Amendment for the very reasons offered in its support. Flack, *Op. Cit.*, p. 87. The House of Representatives concurred with the Senate with respect to the purpose and effect to be given the Amendment. Flack, *Op. Cit.*, p. 94. The public press seemed to realize the purposes of the Amendment as those described by Senator Howard; and in some circles there was an expression of fear that the federal courts might thereby acquire too great

power. Flack, *Op. Cit.*, p. 140 ff. Finally, the author concludes at p. 94:

> ". . . We have already observed the statements made in regard to this purpose in the course of the debates, and we feel little hesitancy in saying that it was unquestionably one of the leading motives for the inclusion of this section (one) in the Fourteenth Amendment . . ."

As the first complete and impartial analysis of the circumstances and conditions surrounding the adoption of the Fourteenth Amendment, it does not seem improper even at this date to give some effect to the real purposes of the Amendment. We must always remember that the Fourteenth Amendment was, as Flack illustrates, largely a product of the war between the states and a strong desire on the part of the country to enlarge the powers of the federal government by restricting those of the states. Thus future civil wars might be averted. There was, in other words, a definite shift toward a more centralized government after 1865 from which shift emanated the Fourteenth Amendment.

In the face of many decisions by this court based largely upon the majority opinion in the *Slaughter-House Cases*, 16 Wall. 36, the question arises, how should this court give effect, if it is to give effect, to the larger purpose of the Amendment? Obviously, there are three alternatives: first, to disregard the facts adduced by Mr. Flack and continue to follow the reasoning of the majority opinion in the *Slaughter-House Cases, supra;* second, to reverse the majority opinion in that case and give complete effect to the

fundamental purpose of the Amendment; third, to choose a middle course tending to liberalize the construction of the Amendment in its application to situations arising in the future. The first alternative is hardly worthy of a court that adheres to sound reasoning and authentic facts; therefore, we do not anticipate such a choice in this tribunal. It is, of course, no reflection upon the majority who decided the *Slaughter-House Cases, supra,* that they should have reached the conclusion on the privileges and immunities clause which they did. They did not have the benefit of some forty years' historical perspective nor of the copious source materials which were Mr. Flack's. The second alternative has much to recommend itself except possibly for the doctrine of *stare decisis.* The latter principle is not in itself an especially good reason for denying justice contrary to the terms and spirit of the law, but it nevertheless continues to enjoy considerable authority with some courts. It permits the specific points decided in the past under the Fourteenth Amendment to rest undisturbed, and yet does not fetter the proper liberal interpretation of the Amendment in the future. It provides the greater elasticity of application which was always intended for the Amendment, and in addition to the problems of the instant case, will undoubtedly solve many of the vexing problems facing our national government today in many fields.

For these reasons we believe the more liberal construction of the privileges and immunities clause set forth in *Colgate v. Harvey,* 296 U.S. 404, is beyond question the proper approach to this clause. See the dissenting opinion by Mr. Justice Field in the *Slaughter-House Cases, supra,* at p. 83 ff.; dissenting opinion

of Mr. Justice Bradley at p. 111 ff.; and dissenting opinion of Mr. Justice Swayne at p. 124 ff. It would appear that the true significance of the Fourteenth Amendment was more fully appreciated by the minority than by the majority of the court. Apparently from the references of the majority opinion to the slavery question as being the main evil to be cured by the Thirteenth, Fourteenth, and Fifteenth Amendments without regard to the citizens at large, we can understand the major motive for their narrower interpretation of the real purpose behind the Fourteenth Amendment. As a matter of fact toward the conclusion of its opinion the majority go so far as to say that they do not believe the equal protection clause could be made applicable to any but the negroes. To repeat here the contrary contentions of the minority would be merely a futile attempt to improve upon an admirable exposition of views which are plainly and fully corroborated by historical fact.

Mr. Justice Harlan has written several cogent dissenting opinions in accord with the minority opinions of the *Slaughter-House Cases, supra.* The first appears in *Hurtado v. California,* 110 U.S. 516, 538, dealing with the due process clause of the Fourteenth Amendment in relation to the informations in capital cases in California. The second appears in *Maxwell v. Dow,* 176 U.S. 581, 605, involving a trial by a jury of eight under the Utah Constitution. The third appears in *Twining v. New Jersey,* 211 U.S. 78, 117, involving the right of the state court to direct a jury that it might draw an unfavorable inference against the defendant from his failure to testify. Since the *Hurtado* case deals solely with the due process clause, we shall post-

pone consideration of it for the moment, and treat briefly the privileges and immunities clause with regard to the *Maxwell* and *Twining* cases, leaving the due process aspects of each for subsequent discussion.

A careful analysis of these two dissenting opinions by Mr. Justice Harlan, coupled with a notation of his other dissents in similar cases, will reveal the sagacity and propriety of his thought. Compared with later decisions by this court, his contentions have in most respects been sustained. He criticizes in no uncertain terms the majority opinion in the *Maxwell* case, which is based almost entirely upon the reasoning of the *Hurtado* case. The latter has since been modified materially by this court to accord more with Mr. Justice Harlan's views. The *Maxwell* case of course decides that a state may provide for a trial by a jury of less than twelve men in felonies less than capital without violating the privileges and immunities clause of the Fourteenth Amendment. It is significant to observe two things about this case: first, it does not apply to capital crimes; second, Utah does not permit a prisoner's life to be placed twice in jeopardy by appeals of the state after an acquittal or conviction. [Utah, Comp. Laws (1917), section 9208, permitting only limited appeals by the state.] Further comment upon the *Maxwell* case would hardly amount to more than a duplication of Mr. Justice Harlan's dissenting opinion. We have already adverted to strong reasons why this case should ordinarily fall under the protection of the privileges and immunities clause. Flack, *Adoption of the Fourteenth Amendment, supra.* But the right against double jeopardy is, as we have seen and will continue to see from many citations of authority,

a right characteristically *national*, as well as *fundamental*, in scope, meriting and obtaining the recognition and protection of practically every state, not to mention the United States, in the Union by constitutional, statutory, or common law provision. It is a right which can justly be designated because of this recognition as a right which the citizen of one state has in common with the citizens of every other state. The attempt on the part of one state to deny that right within its borders should not be countenanced any more than the attempt by a state to abridge a citizen's right to do business. Finally, whatever we may say or think of the *Maxwell* decision, clear beyond any doubt is the fact this court was not there confronted with a situation like that of the instant case. There a prisoner was being subjected to but one trial for the offense of robbery. There never was any issue of two trials. Here the appellant has been subjected to two trials and two different punishments. These facts make a tremendous difference. The same is true of *Walker v. Sauvinet*, 92 U.S. 90, involving jury trials in civil cases.

As far as the privileges and immunities clause is concerned in *Twining v. New Jersey*, 211 U.S. 78, we call attention once more to the able dissent of Mr. Justice Harlan; and further, that the defendant was on trial for and found guilty of a misdemeanor; that the question involved the privilege against self-incrimination; that there never was any question of trying the defendant twice for the same offense; that there was here as in the *Hurtado* and *Maxwell* cases one and only one trial of the prisoner, and there could have been no second trial because New Jersey jealously guards the right of an accused not to be placed in double jeopardy.

[2 Comp. Stats. of New Jersey (1910) p. 1862, sections 134, 135, where the defendant only is allowed to appeal.] The majority opinion discusses and approves at great length the *Slaughter-House Cases*, which we have already treated and questioned *supra*. The right against double jeopardy, being so fundamental and national in its scope, depends not only upon state citizenship but also upon federal citizenship. See the famous quotation from *Corfield v. Coryell*, 4 Wash. C.C. 371, 380, 381. There are certain common rights, privileges, and immunities which every citizen possesses both in his capacity as a citizen of his state and of the United States. Certain policies of law extend over the length and breadth of the land. "For all the great purposes for which the Federal government was formed, we are one people, with one common country." *Crandall v. Nevada*, 6 Wall. 35, 48-49; *Colgate v. Harvey*, 296 U.S. 404, 426. As the *Colgate* case reiterates, national citizenship was not created by the Fourteenth Amendment, but it was made "paramount and dominant" instead of "derivative and dependent" upon state citizenship. And at p. 428:

> "The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so."

A citizen of this country is first a citizen of the United States and secondly a citizen of his state. Especially in the light of the information supplied by Flack's *Adoption of the Fourteenth Amendment*, we cannot for a

moment dismiss the privileges and immunities clause of that Amendment as an "almost-forgotten clause of the constitution." *Colgate v. Harvey*, 296 U.S. 404, 431.

III. *Right against double jeopardy is protected under due process clause of Fourteenth Amendment.*

A. *Proper interpretation of this clause in light of accurate historical data, recent cases, and pervading national policy among states at large compel such a conclusion.*

Much of the material which merits discussion under this sub-heading has already been treated at some length in Section II above of this brief. Reference is here made to the citations and arguments there presented.

The privileges and immunities clause and the due process clause of the Fourteenth Amendment have today many points in common and had many such at the time of the Amendment's enactment. For this reason Flack's *Adoption of the Fourteenth Amendment* is of great assistance toward the proper understanding and construction of the latter as well as the former clause. From the debates on the Civil Rights Bill, Mr. Flack observes, the inexorable conclusion is that the effect and purpose of the Fourteenth Amendment was to incorporate the first eight amendments of the federal constitution under the due process clause of the Fourteenth Amendment so as to make them applicable to the states. Flack, *Op. Cit.*, p. 271. We urge again upon this court that in the disposition of the instant case a liberal interpretation of the due process clause is proper and imperative for the protection of citizens against

unconstitutional state action causing their lives to be subjected to double, triple, and even quadruple jeopardy.

With this as a point of departure, let us inquire into the meaning of "due process of law." As we all know, the phrase has never received a complete and precise definition. The reasons for this are self-apparent. Constantly cited is *Brown v. Board of Levee Com'rs.*, 50 Miss. 468, 479, where the court says "due process of law" refers to certain fundamental rights which "that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.'" The court proceeds:

> "Some subjects are cognizable in one court, and others in another. What would be 'due process of law' in one proceeding, might not be in another. The nature of the suit or action, and how the judgment will operate, and upon what, must be looked at in determining whether the proceeding has been conducted according to due process of law."

And at p. 481:

> "Although the legislature may at its pleasure, provide new remedies, the power is nevertheless subject to the condition that it cannot, by a new formula, overthrow ancient and fundamental rights in judicial procedures."

Concurring with this reasoning is Daniel Webster's famous declaration in *Dartmouth College v. Woodward*, 4 Wheat. 519:

> "Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

Another oft-quoted definition is found in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276, 277:

> "We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Based mainly upon these cases subsequent decisions of this court and the state courts have framed very similar definitions. *Powell v. Alabama*, 287 U.S. 45, 65-68; *Grosjean v. American Press Co.*, 297 U.S. 233, 243; *Brown v. Mississippi*, 297 U.S. 278, 286; *Ex parte Ulrich*, 42 F. 587; *In re Bennett*, 84 F. 324; *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 707, 708; *Dent v. West Virginia*, 129 U.S. 114, 123, 124; *Hallinger v. Davis*, 146 U.S. 314; *Twining v. New Jersey*, 211 U.S. 78, 99, 100, 102; *Holden v. Hardy*, 169 U.S. 368, 370; *Mooney v. Holahan*, 294 U.S. 103, 112; *Snyder v. Massachusetts*, 291 U.S. 97; *Davidson v. New Orleans*, 96 U.S. 97, 101; *Hebert v. Louisiana*, 272 U.S. 312;

Chicago, Burlington, etc. R'd. v. Chicago, 166 U.S. 226, 234, 235, 236, 240; *Norwood v. Baker*, 172 U.S. 269; *Ex parte Lange*, 18 Wall. 163, 168 ff.; *Near v. Minnesota*, 283 U.S. 697; *Grantello v. United States*, 3 F. (2d) 117, 121; *State v. Doherty*, 60 Me. 504, 509. Additional citations might be multiplied without end, but the foregoing cases together with the authorities which they mention seem to contain all of the salient points.

In *Powell v. Alabama, supra*, dealing with the right of every accused under the due process clause to have counsel, this court said at p. 65:

> "We do not overlook the case of *Hurtado v. California*, 110 U.S. 516, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder. In support of that conclusion the court (pp. 534-535) referred to the fact that the Fifth Amendment, in addition to containing the due process of law clause, provides in explicit terms that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury . . .', and said that since no part of this important amendment could be regarded as superfluous, the obvious inference is that in the sense of the Constitution due process of law was not intended to include, *ex vi termini*, the institution and proceeding of a grand jury in any case; and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the states, was to be interpreted as having been used in the same sense . . .; and that if it had been the purpose of that Amendment to perpetuate the

institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect."

At p. 66:

"The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right 'to have the assistance of counsel for his defense.' In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 241, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation . . ."

And at p. 67:

"Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process of law clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right . . ."

And at p. 68:

"... These latter cases establish that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions . . . The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U.S. 78, 99, where Mr. Justice Moody, speaking for the court, said that '. ... it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."

Accord: *Grosjean v. American Press Co.*, 297 U.S. 233, 242, 243; *DeJonge v. Oregon*, 299 U.S. 353, 364. Mr. Chief Justice Hughes declares in the latter case that the right of peaceable assembly is protected under the Fourteenth Amendment even though it is expressly provided for under the First and not at all mentioned under the Fourteenth Amendment. Free speech, a free press, peaceable assembly, the aid of counsel, and just compensation for property are of little value to a dead man. The right against double jeopardy protects life itself as well as liberty. Certainly its fundamental qualities make it paramount to any of the other rights standing under the shield of the Fourteenth Amendment.

In connection with this important and proper modification of the reasoning in *Hurtado v. California*, *Maxwell v. Dow*, *In re Kemmler*, and *Twining v. New Jersey*, all *supra*, and the other cases dependent thereon, we call attention again to the able dissent of Mr. Justice Harlan in the *Hurtado* case, at p. 547, where he states the interpretation given the due process clause of the Fourteenth Amendment by the majority "would lead to results which are inconsistent with the vital principles of republican government." See, also, Mr. Justice Harlan's dissent in *Patterson v. Colorado*, 205 U.S. 454, involving the question of freedom of speech. In the latter case the majority ruled that this court had no jurisdiction because the question was purely a matter of local law not presenting any federal question. On this point the *Grosjean* case and cases cited therein seem to overrule the *Patterson* case. Mr. Justice Harlan's dissent considered freedom of speech guaranteed under the privileges and immunities clause of the

Fourteenth Amendment. Mr. Justice Brewer also dissented in the *Patterson* case upon the jurisdictional question. When we consider the reasoning of Mr. Justice Harlan's dissents, especially those in the *Hurtado*, *Maxwell*, and *Twining* cases, it is significant to observe that that learned jurist was fully aware of the pitfalls into which the majority's interpretation of the due process clause would inevitably lead subsequent decisions. See p. 547 of the *Hurtado* case, *supra*. Again, his dissent in the *Maxwell* case demonstrates the fallacy of protecting property rights more jealously than the rights of life or liberty. If land cannot be taken without just compensation, it would certainly seem proper not to permit a life to be taken by subjecting a prisoner to double jeopardy. Finally, in the light of Mr. Justice Harlan's dissenting opinions, we can only conclude that this court in *Dreyer v. Illinois*, 187 U.S. 71, 85, 86, written by that justice, would have decided that the right against double jeopardy came definitely within the protection of the due process clause of the Fourteenth Amendment, if that issue had then required solution. See, also, *Keerl v. Montana*, 213 U.S. 135.

Story, in his work upon the constitution [2 Story on the Constitution, (5th ed.) pp. 688-689, section 1938] comments upon the due process and equal protection clauses of the Fourteenth Amendment as follows:

> "... In a country where the rights of the individual citizen were already so well guarded, it might seem like a work of supererogation to establish new guaranties which, after all, in their purpose, must have the same end as others already existing, and in their scope can embrace no more. But at the time of the

English revolution in 1688 it was not deemed unimportant by the able statesmen and profound lawyers who conducted it to a successful conclusion that a bill of rights should be solemnly agreed upon and promulgated, notwithstanding the Great Charter, with all its restrictions and guarantees, was still the law of the land. The securities of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper constitutions' . . .

"A popular form of government, as elsewhere has been shown, does not necessarily assure to the people an exemption from tyrannical legislation . . ."

As to the residue of matter deserving consideration under this sub-heading, it seems wise to defer its treatment in conjunction with sub-heading B which follows.

B. *Right against double jeopardy is a fundamental and immutable principle of law necessary to the protection of the life and liberty of every citizen and not to be abridged by any state.*

1. *English law is in accord.*

From time immemorial in the civilized law of England a prisoner once tried upon a valid indictment for murder and convicted or acquitted, could not thereafter be tried again upon the same indictment or a new indictment charging the same crime. The Crown had no right of appeal, and for very excellent reason, there has

never been any change as to the Crown's right to an appeal or writ of error in murder cases. The plea of *autrefois acquit* or *autrefois convict* was grounded, says Blackstone, upon the "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." 4 Blackstone's *Commentaries* (Lewis edition) 335. In 2 Sharswood's Blackstone's *Commentaries* 361 (4 Blackstone's *Commentaries* 361), the learned English jurist says:

> "... Yet in many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside and a new trial granted by the court of King's bench; for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first."

See note 21 in Sharswood's edition stating that no new trial can be granted in cases of felony or treason where there has been an acquittal. Hale reiterates this statement of law:

> "But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or *e converso*, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same."

2 Hale, *Historia Placitorum Coronae* (1847 ed.), 245; see also pp. 240, 246.

Bacon agrees:

> "If the defendant in an indictment or information have been acquitted, the court will not grant a new trial, notwithstanding the verdict were contrary to evidence . . . and the rule is the same though the acquittal was founded on a misdirection of the judge . . ."
>
> 9 Bacon's *Abridgment* (1846 ed.) 626.

Hawkins' discussion of the plea of *autrefois acquit* observes that it is grounded on the maxim that a man shall not be brought into danger of his life for one and the same offense more than once. Thus where a man is once found not guilty on an indictment which is valid and well commenced before a competent court, he can never be tried again for the same offense. 2 Hawkins, *Pleas of the Crown* (1824 ed.), 515, chap. 35, section 1; see also p. 520, section 6; see further p. 526, concerning the plea of *autrefois convict*.

Staunford describes the plea of *autrefois acquit* resting upon the common law maxim that a man's life cannot be placed twice in jeopardy for the same offense---"eo que home per common ley ne mitter a sa vie deux foitz in ieopardie de trial pur un mesme felonie"---. Staunford, *Les Plees Del Coron*, 105. Broom calls the rule against double jeopardy a "great fundamental rule of our criminal law." Broom's *Legal Maxims*, (8th ed. by Pease and Chitty), p. 273. Of course the pleas of *autrefois acquit* and *autrefois convict* are based upon the same fundamental and immutable principle of law. Halsbury refers to the familiar maxim in 9 Halsbury, *Laws of England*, (2d ed.) Hailsham Ed., pp. 152-153,

section 212. Russell on Crimes (6th ed.) 38, 42, 43, repeats the principles heretofore described.

Although hardly germane to the issues of this case, it is interesting to note in passing the existence at primitive English law of the barbaric hangover of the ancient blood-feud, the "appeal of murder." It generally amounted to a trial by battle, which Glanville frowned upon, and which was devised solely upon the basis of the barbarous doctrine that the next of kin had a right to blood or money for a slain relative. 1 Pike, *A History of Crime in England*, pp. 124-125. The ancient appeal of murder was a private action brought within a year and a day by the widow or an heir male of the victim against the slayer as distinguished from the civilized common law indictment which was a public action at the suit of the king to right a public wrong done "against the King's peace." 1 Pike, *Op. Cit.*, pp. 289-290; 4 Blackstone's *Commentaries*, pp. 312-315; *The Mirror of Justices*, (Whittaker ed.), p. 59; 1 Britton (F. M. Nichols ed.), p. 97; Maitland, *The Constitutional History of England*, p. 480; Glanville (Beames' and Beale's translation) pp. 285-286; 2 Bracton *de Legibus Angliae* (Sir Travers Twiss ed., 1879) pp. 151-153, Chap. V.

The appeal of murder was the remnant of a feudal age in which might made right. It is, of course, the outstanding example of the horror and primitive savagery of early barbaric justice. Fortunately, it was quickly replaced upon the advent of the common law indictment. 1 DeLolme, *The English Constitution* (1838 ed.) p. 80. But Bracton does indicate that the rule against double jeopardy may have had its incep-

tion in appeals of murder. 2 Bracton *de Legibus Angliae* (Sir Travers Twiss ed., 1879), p. 417, chap. XIX, section 8; see also p. 419, chap. XIX, section 10. The last attempt at an appeal of murder came in *Ashford v. Thornton*, 1 Bar. & Ald. 405. It was abortive, and the case ended with a plea of *autrefois acquit*. *Id.*, p. 461. Shortly thereafter appeals of murder were abolished by Parliament to accord with what had been for many years practically the established fact.

The English cases sustain the statements so often repeated by the English text writers concerning double jeopardy. *Wemyss v. Hopkins*, L.R. 10 Q.B. 378, in which Lush, J., refers to the rule against double jeopardy as a "fundamental principle of law." In *Rex v. Sheridan*, 30 Cox C.C. 447, the defendant pleaded not guilty to a charge of obtaining money under false pretenses. Evidence was heard in a magistrates' court, and defendant was found guilty. Then the police gave defendant's record to the court on the question of the sentence, whereupon the court decided to commit the defendant for trial at quarter session. He was again found guilty. At the latter trial the defendant pleaded *autrefois convict*, was overruled, and appealed. His second conviction was quashed because he had been previously tried before a court of competent jurisdiction. Accord: *Rex v. Grant*, 30 Cox C.C. 453. *Vaux's Case*, 4 Co. Rep. 44 a, discusses the basis for a plea of *autrefois acquit* and rules that unless there is a valid indictment at the first trial there has been no jeopardy. In *Rex v. Reynell*, 6 East 314, the defendant was indicted for a misdemeanor and was acquitted. The Crown sought a rule to set aside the verdict on the grounds that it was against the weight of evidence. The rule

was refused. The Crown argued that the offense, failure to keep certain fences in repair, although in the form of an indictment, was only a civil trial. The Crown's counsel, however, was forced to admit that he knew of no cases where a new trial had ever been granted after a verdict of acquittal in cases of indictments.

Sir John Wedderburn's Case, Foster Crown Cases, 22, presented the question whether in a capital case at the request of the prisoner and his counsel the trial court may discharge a jury before evidence is given in order to let the prisoner into a defense which, in the court's opinion, he could not otherwise have been let into. See p. 31. It was held that the court could do so under the circumstances. The court said at p. 38:

> "The discharging the jury in this case was not a strain in favour of prerogative; it was not done to the prejudice of the prisoners; on the contrary it was intended as a favor to them.
>
> "In that light, I say, it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney-General, with his usual candour, consented to it."

The court further observes at p. 37 that in these circumstances there was no double jeopardy.

In *Holcroft's Case*, 2 Coke's Rep., Part IV, 46b., the court said:

> ". . . if a man commits murder, and is indicted and convicted or acquitted of manslaughter, he shall

never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is in respect of the circumstances of the forethought malice more odious."

See also *Rex v. Parry*, 7 Car. & P. 837. In *Rex v. Lea*, 2 M.C.C. 9, the court said that after a verdict of acquittal, no new trial can be granted to the Crown even though the verdict was reached without evidence and against the opinion of the judge. In *Rex v. Praed*, 4 Burr. 257, the court held that a verdict for a defendant in a criminal prosecution cannot be set aside. Again, in *Rex v. Silverton*, 1 Wils. K.B. 297, involving an indictment for failure to repair a highway, the verdict was in favor of the defendant. Upon the Crown's motion for a new trial, the court held new trials were never granted in criminal cases where the defendant was acquitted. Accord: *Lofft*, 451 (*Anonymous*); *The King v. Jackson*, 1 Lev. 124; *Rex v. Cohen*, 1 Stark. 516, where the court, after a defendant had been acquitted upon an indictment as the result of a misdirection by the trial judge, refused to grant a new trial to the Crown.

In *Regina v. Winsor*, 10 Cox C.C. 276, the defendant had been indicted for murder. At the first trial the jury disagreed after a lengthy consideration of the case. Finally, at approximately 11:40 p.m. Saturday evening, the court discharged the jury. He was tried again upon the same indictment, and at the second trial he claimed his privilege against double jeopardy. The case is discussed by the judges at great length. All of them concurred that the defendant had not been subjected to double jeopardy because no verdict had been

rendered by the jury. Cockburn, C. J., at pp. 313-314, acknowledges that the maxim no man ought to be put in peril twice on the same charge is a fundamental maxim of the English law. But, he says,

> "It means this, that a man shall not twice be put in peril. After a verdict has been once pronounced, that verdict being one which it was competent for the jury to pronounce, you shall not harass the man a second time if he has been convicted and sentenced. Still less shall you harass him a second time if he has been pronounced not guilty by a jury of his country."

Lush, J., also refers to the maxim as a "fundamental maxim of law." See p. 324.

All the judges concurred that the only manner in which the rule against double jeopardy could be invoked was by a plea of *autrefois acquit* or *convict.* See pp. 296, 315, 324. On appeal by the defendant, Erle, C. J., reiterates that the first trial was abortive because there was no verdict, therefore there was no jeopardy. The judges also concurred that a trial judge at a criminal trial can exercise his discretion in discharging a jury which has disagreed without thus placing the defendant in jeopardy. Therefore, at a second trial later upon the same indictment the defendant cannot claim double jeopardy.

So basic has been the rule against double jeopardy in England that a decision in 1869 went so far as to declare that not even the defendant himself can appeal a conviction of murder. *Regina v. Murphy,* Law Reports, 2 Privy Council App. 535. While we can under-

stand the deep reverence of the English court for the fundamental principle of double jeopardy, nevertheless we question the logic or necessity of preventing a defendant from appealing a conviction. In this respect the universal rule in the United States is much more sensible. But cf. *United States v. Gibert*, 2 Summer 19, 25 Fed. Cases 1287. Of course, in England the defendant is given recourse to the mercy of the Crown's pardon when an appeal by him is denied as in *Regina v. Murphy, supra.*

Thus the conclusion is manifest that the English common law has always regarded the right against double jeopardy as a fundamental and immutable principle of justice.

2. Crushing weight of authority in United States concurs that right against double jeopardy is a fundamental and immutable principle of law.

The foremost authority in this country on this point is *Kepner v. United States*, 195 U.S. 100. We have already cited and quoted this case above at pp. 24, 25, of this brief. The same is true of *Ex parte Ulrich*, 42 F. 587, *In re Bennett*, 84 F. 324, and *Ex parte Lange*, 18 Wall. 163, found at pp. 25, 26, 27, of this brief.

Story refers to the double jeopardy provision of the Fifth Amendment as a "great privilege secured by the common law." 2 Story on the Constitution (5th ed.) p. 564, sec. 1787. In *Bens v. United States*, 266 F. 152, the court discusses the right against double jeopardy at length, p. 159:

> "There is no power in any court to try him a second time, and a second judgment would be, not merely erroneous but absolutely void."

The court held, however, the case there under consideration presented two separate and distinct offenses. *Ex parte Glenn,* 111 F. 257, also discusses the double jeopardy maxim and concludes that a trial court may only discharge the jury without the defendant's consent in cases of "unavoidable necessity"; otherwise jeopardy will have attached and the defendant cannot thereafter be tried again. The generally accepted doctrine of double jeopardy is stated in 8 R.C.L. 134, sections 114 and 115.

The rule against double jeopardy is so strongly entrenched in the federal courts that this court decided in *United States v. Ball,* 163 U.S. 662, an acquittal upon a defective indictment is a bar to a second indictment for the same killing. There this court declared that the ingenuity which suggests that there is no jeopardy because the courts will discover the defect before judgment is rendered is far-fetched. The assumed infallibility of the courts is something which cannot be admitted. See *Id.,* p. 668. This court has further held that an acquittal at a court martial is a bar to a prosecution in the criminal courts. *Grafton v. United States,* 206 U.S. 333.

In *Trono v. United States,* 199 U.S. 521, the majority decided that a defendant was not subjected to double jeopardy upon a second trial where he himself appealed from the verdict of the first trial. Three justices, however, dissented on the proposition that he could be re-tried *de novo* for first degree murder even

though at the first trial he had been acquitted of that crime and convicted of assault. Another case decides no right of review by the government exists after an acquittal upon an indictment of murder. *United States v. Evans*, 213 U.S. 297. In *Hebert v. Louisiana*, 272 U.S. 312, holding upon the facts of the case there was no double jeopardy, this court declares, at p. 314, a defendant may be subjected to both a state prosecution and federal prosecution "without any infraction of the constitutional rule against double jeopardy," the latter being limited to repeated prosecutions for the same offense.

We come next to a brief consideration of *United States v. Sanges*, (1891) 144 U.S. 310. That case held the government had no right to a writ of error where in a criminal case the defendant's demurrer seeking to quash the indictment was sustained by the trial court. There is some *dicta* in the case which the appellee quoted in his brief before the state court which, it would seem, unless properly understood, might prove misleading. The court states that the government cannot review a judgment of the trial court "unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government." See p. 318. The case itself, of course, deals only with the government's right to a review upon a judgment sustaining defendant's demurrer to the indictment. Any other comment concerning the states is but purest *dicta*. In 1891, when the *Sanges* case was decided, no state in the country permitted appeals by the government after an acquittal except Connecticut, whose statute now in question had been enacted in 1886. But even the construction of

that statute was in doubt until 1894 when *State v. Lee*, *supra*, was decided. Thus, in speaking as it did this court undoubtedly had in mind statutes in some states which permit appeals by the government from judgments on preliminary matters occurring prior to the time jeopardy attaches. This view is corroborated by the explanation of this case in *Kepner v. United States*, 195 U.S. 100, 129, where it is shown that the court in the *Sanges* case did not intend to rule that a statute allowing the state to appeal after an acquittal would be constitutional. Furthermore, the later cases of *Dreyer v. Illinois*, 187 U.S. 71, and *Keerl v. Montana*, 213 U.S. 135, definitely confirm the appellant's view of the *dicta* in the *Sanges* case, because in both of those former cases this court specifically declares that the question of a state's right to place a man's life in double jeopardy under the Fourteenth Amendment has never been decided. Therefore, no sanction for the conduct of the state in the instant case can be adduced from any language of the *Sanges* case, nor for that matter from the language of the *Kepner v. United States*, 195 U.S. 100, 133, where reference is made to the fact that the Connecticut constitution contains no provision against double jeopardy. It is quite apparent from the *Kepner* and *Sanges* cases that this court never intended to preclude an original decision of the issues in the instant case by the use of such incidental comment employed without the slightest reference to the Fourteenth Amendment. Compare *Gitlow v. New York*, 268 U.S. 625, 666, where the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, declaring the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, is expressly overruled. Moreover, as the court says in the *Sanges*

case, the legislature in passing any such statute authorizing a review at the instance of the government must act "within its constitutional authority." This naturally implies both within the state and the federal constitutions. And in construing what "constitutional authority" means, there is the later case of *Chicago, Burlington, & Quincy R. Co. v. Chicago*, 166 U.S. 226, where this court held that a judgment of a state court, even though authorized by state statute, by which private property was taken for public use without just compensation, was in violation of the due process clause of the Fourteenth Amendment. At p. 234 this court stated:

> "It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard met the requirement of due process of law . . . But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

Let us turn now to a short consideration of the state courts. In *State v. Muolo*, 118 Conn. 373, 376, the Connecticut court cites two cases from Maryland in support of its contention that the state may bring a writ of error even from a judgment of acquittal after trial. Incidentally, the court also observes that Maryland is a state the development of whose criminal jurisdiction has been quite like Connecticut's. It would be well to examine the two Maryland cases, *State v. Buchanan*, 5 Harr. & J. (Md.) 317, and *State v. McNally*, 55 Md. 559, cited by the Connecticut court. In the *Buchanan* case the state was permitted to sue out a writ of error to review a judgment by the trial court in a criminal case sustaining the defendant's demurrer to the indictment. In the *McNally* case the defendants were indicted for stealing three bushels of wheat. The indictment was quashed by the trial court on the grounds that it contained several distinct charges of felony. The state was permitted to sue out a writ of error to review the trial court's judgment in sustaining the defendant's motion to quash. The trial court was reversed.

Clearly, neither case is any authority whatsoever for the rule that the state in Maryland can have a writ of error even after an acquittal following a trial. As a matter of fact Maryland does not permit such a procedure. See Bagby's Ann. Code of Maryland, Article 5, Section 86, where the state is allowed only a limited right of appeal. See, also, *Cochran v. State*, 119 Md. 539, which affirms the rule in *State v. Shields*, 49 Md. 301, to the effect that after an acquittal of a defendant for a felony or misdemeanor, the verdict of acquittal can never afterwards be set aside. In the *Shields* case the Maryland court had before it for construction a

statute very similar to the Connecticut statute here involved. The Maryland court held that the state in criminal trials could ask for review of its exceptions *only in cases where the convicted party had taken an appeal*. The court further stated that the rule against double jeopardy was "founded in the benevolence and mercy of the common law, which has prevailed here since criminal aw was first administered in Colonial times." Hence from these cases it would appear that the development of criminal jurisdiction in Maryland is more in accord with better legal reasoning than the development in Connecticut insofar as no appeals by the state are permitted after an acquittal. This development, it further appears, (which as we have seen the Connecticut court approves), has taken place in spite of the fact the Maryland constitution, like that of Connecticut, contains no provision against double jeopardy.

In *State v. Reynolds*, 4 Hayw. (Tenn.) 110, the court declared that the state cannot appeal or have a writ of error because to do so would violate the rule against double jeopardy.

> "Were it not for this salutary rule one obnoxious to the government might be harassed and run down by repeated attempts to carry on a prosecution against him."

Accord: *Holt v. State*, 160 Tenn. 366; *State v. Solomons*, 6 Yerger (Tenn.) 246.

A Michigan case in 1906 involved facts similar to those of the instant case. *People v. Farrell*, 146 Mich. 264. On an information the defendant had previously

been convicted of manslaughter. Subsequently he was convicted of murder in the first degree and sentenced to life imprisonment upon the same information. The court in the cited case reversed the second judgment and remanded the case with directions to sentence the defendant for manslaughter. See, also, *People v. Swift*, 59 Mich. 529.

New Jersey does not permit appeals by the state from an acquittal. *State v. Hart*, 90 N.J.L. 261. The rule is to prevent oppression. And in another New Jersey case the court praised highly the fundamental principle of common law protecting a defendant against double jeopardy. *State v. Cooper*, 13 N.J.L. 361, 370. The court declares that even if the constitution of New Jersey had not contained an express provision against double jeopardy, the New Jersey courts "would have recognized it, and acted upon it, as one of the most valuable principles of the common law, . . . And all who are conversant with courts of justice, . . . must be satisfied that this great principle forms one of the strong bulwarks of liberty; and that if it be prostrated, every citizen would become liable, if guilty of an offense, to the unnecessary costs and vexations of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials."

In Massachusetts, another state whose constitution contains no express provision against double jeopardy, the state is not permitted to appeal or sue out a writ of error. *Commonwealth v. Cummings*, 3 Cush. 212; 9 Ann. Laws of Mass., c. 250, sec. 9. Kentucky follows the same general rule. *Wilson v. Commonwealth*, 212

Ky. 584; *Commonwealth v. Olds*, 5 Littell (Ky.) 137. Although the facts in the latter case did not require an application of the rule against double jeopardy, the court nevertheless gives an informative discussion of that fundamental principle at p. 139. Like most of the other state courts, Kentucky regards the principle as protection against oppression. *Williams v. Commonwealth*, 78 Ky. 93. In the latter case the defendant was indicted for grand larceny. Evidence was heard. Suddenly the state moved to dismiss the indictment over defendant's objections. A state statute permitted such a dismissal. The state constitution contained a provision against double jeopardy. The court declared the statute was unconstitutional. In construing the statute, it adhered to the accepted meaning of double jeopardy at common law. To do otherwise, the court says,

> ". . . would be at war with every sense of justice, subversive of civil government, and contrary to the whole theory of our institutions. There is nothing better settled in the jurisprudence of England or America than that no one can be twice tried for the same offense."

Other cases in accord with the view that the right against double jeopardy is a fundamental and immutable principle of law are: *Ex parte Bornee*, 76 W. Va. 360, cited *supra; State v. Kemp*, 17 Wis. 690; *State v. Hand*, 6 Ark. 169; *Pierson v. State*, 159 Ala. 6; *People v. Webb*, 38 Cal. 467; *People v. Miller*, 144 Ill. 308; *State v. Jones*, 7 Ga. 422; *State v. Powell*, 86 N.C. 640; *Commonwealth v. Perrow*, 124 Va. 805. It is significant to observe that Virginia adopted its new constitution as late as 1902, and at that time they incorporated a specific provision against double jeopardy.

North Carolina, another of the few states apparently without any specific provision against double jeopardy in its constitution, prohibits appeals by the state after an acquittal regardless of whether or not that acquittal is due to an erroneous charge of the trial judge. *State v. Powell, supra;* Jerome's Crim. Code & Digest of North Carolina (5th ed.) p. 36, sec. 4649. The state can only appeal from erroneous rulings of the court where judgment is rendered on a demurrer, a special verdict, a motion to quash or in arrest of judgment. See p. 643 of the *Powell* case:

> "... In our opinion an acquitted defendant cannot be again put upon trial for the same offense at the instance of the state, neither in the form of a second independent prosecution, nor of an appeal which attempts to avoid the results of a former trial in the same prosecution ..."

The court continues at p. 647 to state that the principle against double jeopardy is "a principle of the common law ... as well as humanity."

We shall omit endless other citations from the state courts because the principle is so elementary and fundamental as to obviate the necessity of further authority. The state constitutions of all but a very few states embody in one form or another the principle against double jeopardy; and many of these same states have added statutes upon their books to reinforce, as though it were necessary, the rule. A number of states grant limited rights of review to the government upon judgments of the trial court involving preliminary motions, demurrers, etc., where jeopardy has not attached. Appeals by the government are not permitted after ac-

quittal or conviction. The following are most of the states with constitutional provisions: *Ala.*, I. 9; *Ariz.*, II. 10; *Cal.*, I. 13; *Colo.*, II. 18; *Fla.*, D.R. 12; *Idaho*, I. 13; *Ill.*, II. 10; *Ind.*, I. 14; *Mont.*, III. 18; *Neb.*, I. 12; *Kan.*, Bill of Rights 10; *Nev.*, I .8; *N. Mex.*, II. 15; *N.Y.*, I. 6; *N. Dak.*, I. 13; *Ohio*, I. 10; *Ore.*, I. 12; *S. Dak.*, VI. 9; *Utah*, I. 12; *Va.*, I. 8; *Wash.*, I. 9; *Wyo.*, I. 11; *Minn.*, I. 7; *Wis.*, I. 8; *Ark.*, II. 8; *Ga.*, I. 2-108; *La.*, 9; *Miss.*, III. 22; *Okla.*, II. 21; *S.C.*, I. 18; *Tex.*, I. 14; *W. Va.*, III. 5; *Del.*, I. 8; *Ky.*, 13; *Me.*, I. 8; *Pa.*, I. 10; *Tenn.*, I. 10; *Iowa*, I. 12; *Mich.*, II. 14; *N.H.*, I. 16; *N.J.*, I. 10; *R.I.*, I. 7; *Mo.*, II. 23.

The following are most of the states with statutes either granting only limited rights of review at the instance of the government, or entirely prohibiting such review: *Ala.*, Code of 1928, sec. 3239; *Ariz.*, Rev. Code 1928, sections 5136, 5139; *Ark.*, Crawford & Moses Digest of Statutes, 1919, sections 3410, 3411, 3412; *Cal.*, Penal Code (Deering, 1931), sections 1238, 1242; *Colo.*, 2 Miller, Ann. Stats., 925, sec. 2124; *Fla.*, 4 Comp. Gen. Laws (1927), section 8460; *Idaho*, Code Ann. (official ed. 1932), sections 19-2704, 19-2708; *Ind.*, Burns' Indiana Stats. Ann. (1933), section 9-2102; *Iowa*, Code, 927, section 1400; *Kan.*, Gen. Stats. Ann., 935, section 62-1703; *La.*, Code of Crim. Procedure (Dart, 1932), section 540; *Md.*, Ann. Code (Bagby), art. 5, section 86; *Mass.*, 9 Ann. Laws, c. 250, section 9; *Mich.*, Comp. Laws (1929), section 17366; *Minn.*, Mason's Minn. Stats. (1927), section 10747; *Miss.*, Code Ann. (1930), section 19; *Mo.*, Stats. Ann. 4, sections 3752, 3753; *Mont.*, Rev. Code (1921), section 12108; *Neb.*, Comp. Stats. (1929), section 29-2316; *Nev.*, Comp. Laws (1929), section 11084; *N.J.*,

2 Comp. Stat. (1910), p. 1862, sections 134, 135; *N. Mex.*, Stats. Ann. (1929), section 105-2527; *N.Y.*, Gilbert's Crim. Code & Penal Law (1934), p. 405, section 518; *N.C.*, Jerome's Crim. Code & Digest (5th ed.), p. 36, section 4649; *N. Dak.*, Comp. Laws (1913), section 10993; *Ohio*, 2 Page's Ann. Ohio Gen. Code, p. 5873, section 13764; *Okla.*, Comp. Stats. (1931), section 17-3191; *Ore.*, Code (1930), section 13-206; *R.I.*, Gen. Laws (1923), section 5109; *S. Dak.*, Comp. Laws (1929), section 5032; *Tenn.*, 7 Williams' Tenn. Code Ann. (1934), section 11805; *Tex.*, 3 Vernon's Ann. Crim. Stats. (1925), p. 184, art. 812; *Utah*, Comp Laws (1917), section 9208; *Va.*, Code of 1936 Ann., section 4931; *Wash.*, 4 Remington's Rev. Stats. of Wash. (1932), p. 308, section 2183-1; *W. Va.*, Official Code of W. Va., chap. 58, art. 5, section 1, p. 1418; *Wis.*, Wis. Stats. (1935), p. 2778, section 358-12; *Wyo.*, Rev. Stats. (1931), p. 654, sections 33-909, 33-912.

Among the American text writers the principle of double jeopardy is everywhere recognized as a fundamental proposition of law. Willoughby, *Constitutional Law of the United States*, p. 474, section 470; 2 Revision of Swift's Digest (Dutton ed., 1874), pp. 425, 426; 1 Cooley's *Constitutional Limitations* (8th ed.), p. 685; 2 Freeman on Judgments (5th ed.), p. 1370, section 650; 1 Bishop on Criminal Law (9th ed.), p. 734, section 992; 1 Bishop, *Op. Cit.*, p. 772, section 1045; 1 Wharton's *Criminal Law*, p. 556, section 396; 1 Wharton's *Op. Cit.*, p. 538, section 395; Pomeroy, *Constitutional Law* (3d ed.), pp. 155, 156, sections 244, 246.

Bishop speaks thus:

> "After jeopardy has attached to the party, the government can take no step backward. If, through a misdirection of the court on a question of law, or a mistake of the jury, or their refusal to obey instructions or any other like cause, a verdict of acquittal is improperly rendered, it can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted. It follows that a statute which provides for an appeal from a verdict of not guilty rendered by a proper jury in a court which has jurisdiction is unconstitutional and void." 1 Bishop on Criminal Law (9th ed.), p. 734, section 992.

And again at p. 772, section 1045, he declares:

> ". . . Now if the power which brings a man into and controls the jeopardy—namely, the State and its agent, the court—proceeds unlawfully after the jeopardy has thus attached, it is not sound in legal reasoning to say that this unlawful conduct nullifies the jeopardy. If it did, then the process might be repeated forever, and the constitutional guaranty be rendered void. We may presume that it was to prevent exactly this sort of thing that the constitutional inhibition was established."

Furthermore, we observe that the recent case of *Powell v. Alabama*, 287 U.S. 45, has held that the right to aid of counsel in a rape case involving the death penalty is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. Certainly the right against double jeopardy is just as fun-

damental and just as much within the protection of the due process clause. The right to counsel is only a comparatively recent addition to the bundle of fundamental rights enjoyed by every citizen beyond governmental control. 2 May, *Constitutional History of England*, p. 558; *People v. Fochtman*, 226 Mich. 53, 56. Until 1836 in England the right to counsel was not granted every prisoner even though he was accused of the commission of a felony.

Another matter of importance with respect to new trials at the instance of the state is the fact that cross-examination of the state's witnesses at the second trial is a stale proposition. They are forewarned of the pitfalls into which the inaccuracies of their testimony at the first trial inevitably led them and they are naturally prepared at the second trial to polish the rough edges of their story. When a man's life is in the balance, guilty or innocent, the state's witnesses should not have the opportunity of telling their story but once before one court and one jury. Moreover, a defendant should never be subjected to the possibility of having his own witnesses disappear during the interval between two trials. What may be adequate in these respects in a civil trial is by no means adequate in a criminal trial.

The right against double jeopardy is a right so fundamental that it ought once and forever to be placed beyond the control of governmental action. In *Loan Association v. Topeka*, 20 Wall. 655, Mr. Justice Miller, speaking for the court, said:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such

rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism."

The state deserves one trial in a criminal case, and only one trial. That is all it received in the *Hurtado, Maxwell, Kemmler,* and *Twining* cases; that it is all it can demand under the due process clause of the Fourteenth Amendment. Guilty or innocent, no man should be harassed by the state through constant prosecutions for the same offense. The right to be free from such a despotic power is inherent and fundamental in the nature of our civil and political institutions. The people of both England and America long ago learned the lesson of state tyranny. We cannot at this moment permit it to be so easily forgotten. In *Boyd v. United States,* 116 U.S. 616, 635, this court declared:

". . . illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Accord: *Byars v. United States*, 273 U.S. 28, 32. And in *United States v. Perez*, 9 Wheat. 579, Mr. Justice Story stated:

> ". . . in capital cases especially, courts should be extremely careful how they interfere with any chances of life, in favor of the prisoner."

Again, as Mr. Justice Brandeis so aptly states in his dissent to *Olmstead v. United States*, 277 U.S. 438, 479,

> ". . . Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

There is an eloquent exposition of the foundation of the right against double jeopardy by Nisbet, J., in *State v. Jones*, 7 Ga. 422, approved in *State v. B'Gos*, 175 Ga. 627, 634, 635. Our researches have failed to disclose any other statement quite so apposite. For this reason we shall take the liberty, as we often have already done in this brief, of quoting at large. Judge Nisbet begins at p. 424 with the statement the English and American rule in criminal cases is well-settled that the state has no right of appeal after an acquittal, even though the latter is founded upon an error of the court.

> "These principles are founded upon that great fundamental rule of the Common Law, *Nemo debet bis vexari pro una et eadem causa;* which rule, for greater caution and in stricter vigilance over the

rights of the citizen against the State, has been in substance embodied in the Constitution of the United States, . . .

". . . But, farther, the Common Law maxim and the Constitution are founded in the *humanity* of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the state . . .

". . . The trial of a citizen for a violation of the Criminal Law, is a very different thing from the trial of civil rights between two citizens. The forms of procedure, and the principles upon which they proceed, are different. When the prosecution is upon information, the prosecutor is not to be viewed in the light of a party. He has no rights to be violated by denying the writ of error—he has no more interest in the administration of criminal justice than has every other citizen. The offense to be punished is against the people. The violation is of a public law—the object of the trial is not compensation or restitution, or the settlement of conflicting claims to property, but punishment if there is guilt. The punishment inures to the safety and peace of the whole body politic. If there is, by reason of the offense charged, an injury done, especially to any one person, he has a remedy for the wrong. In criminal trials, the State—the supreme authority—that authority which makes the law, and prescribes its penalty, and executes its judgments—moves against the citizen. The Court, the Jury and the Solicitor General are its agents. The State is not a party—the State is rather an accuser . . . she charges crime,

arrests, tries, convicts and executes. In criminal causes, the State, through her agents, is the judge who tries the accused. In civil cases, she stands aside and leaves the parties to litigate upon equal terms before a tribunal independent of both. Thus unequally do the State and the defendant enter upon an issue, the result of which may involve the liberty or life of the one, and no *sensible* consequence to the other. Viewed in this light, it is a concession in behalf of the defendant, both humane and reasonable, that the *State* should not review her own errors—that she should decide but once. If it were not essentially in all cases, just, yet it is still expedient. It is a salutary precaution in favor of the citizen against an abuse of the sovereign authority; for history teaches the melancholy truth, that however fenced and guarded, limited and defined, by laws or usages, it sometimes breaks over all these barriers, defies the sentiment of the world, and in the name of the law violates justice and outrages humanity. The reign of the Stuarts in England, illustrates these views: that *the State* will not, in this signally favored country, thus abuse its powers, is not only hoped but believed. Vigilant for right and liberty, we will not trust her, but hold her steadily to the just limitations within which the wisdom of other States and past generations have circumscribed her."

Our country today is recognized as one of the few great democracies of the world. We pride ourselves upon the liberty with which every American citizen is endowed. We frown upon the cancerous conditions now existing in various countries of Europe and boastfully predict our perpetual immunity from them. But must

our country or any state of the Union, inspired by this broad, expanding spirit of freedom, be allowed to become so reckless as to forget the lessons of history? Are we becoming so overconfident in our democratic traditions that we feel we can begin to cast aside some of its fundamental safeguards? Has the life of a man, guilty or innocent, become so cheap that the sword of Damocles can be held over his head more than once at the fancy of the government? Is this the "progress" in criminal law upon which we choose to pride ourselves? If all of these questions are true, then there is no finer or more insidious method of starting the debacle than to permit double jeopardy to exist in the states.

In closing, the language of this court in *Ex parte Lange*, 18 Wall. 163, 178, comes to mind:

> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

CONCLUSION

Therefore, we submit that the right against double jeopardy, based upon either a plea of former conviction or acquittal as it might be in the instant case, is a fundamental and immutable right, national in its scope, and belonging to every citizen of this country. No state can abridge that right. We submit on the authorities and argument of this brief that Section 6494 of Title 60, Chapter 335, of the General Statutes

of the State of Connecticut, Revision of 1930, as applied to the facts of this case, violates both the privileges and immunities clause and the due process of law clause of Section 1 of the Fourteenth Amendment, and that the judgment in *State v. Palko*, 122 Conn. 529, should be reversed and vacated.

Respectfully submitted,

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The Appellant,

By DAVID GOLDSTEIN,

GEORGE A. SADEN,

Counsel for Appellant.

October 25, 1937

Bridgeport, Connecticut.